Lim Guan Eng v Utusan Melayu (M) Bhd

HIGH COURT (PULAU PINANG) — CIVIL SUIT NO 22NCVC-16 OF 2011
VARGHESE GEORGE J
21 DECEMBER 2011

Civil Procedure — Pleadings — Malice — Failure to plead — Whether plaintiff failed to give notice of plea of malice — Whether plaintiff provided particulars of facts or inferences of facts to negate defendant's claim of qualified privilege in his Statement of reply — Whether defendant's plea of qualified privilege could be defeated — Rules of the High Court 1980 O 78 r 3(3)

Tort — Defamation — Libel — Publication of defamatory article in newspaper — Whether article was defamatory of plaintiff — Whether words had tendency to disparage and injure plaintiff's standing, character and reputation — Defences — Response to plaintiff's attack against defendant — Whether there was attack on defendant in plaintiff's speech — Whether response was appropriate and connected to matters raised in attack — Qualified privilege — Whether publishing of article done with malice — Whether plaintiff had proved malice — Whether defendant could rely on defence of qualified privilege

The plaintiff, the Chief Minister of the state of Pulau Pinang, who held various political positions alleged that the defendant, the owner, publisher and printer of the newspaper known as the *Utusan Malaysia,* had wrongfully and with the intention to defame the plaintiff published a feature article entitled 'Kebiadaban Guan Eng' ('the article') in its newspaper issue of 20 December 2010. The article that was 31 paragraphs in length, also included a prominent and distinct boxed portion at the top centre, which listed in bullet-form the 'attitudes and action' of the plaintiff. The plaintiff commenced the present action against the defendant for damages in libel arising from this publication. According to the plaintiff the alleged defamatory statements, as identified in seven paragraphs of the plaintiff's statement of claim, were untrue and published with the intention of disparaging the plaintiff in public and of lowering the plaintiff's reputation and standing socially in the offices he held. Although the defendant admitted publishing the article, it contended that this article was published as a response to an attack made by the plaintiff against the defendant in his speech at the 'Konvensyen Pakatan Rakyat Kebangsaan Kedua' ('the convention') held in Pulau Pinang on 19 December 2010. According to the defendant the publication of the article was made *bona fide* and was a fair and relevant response to the alleged attack by the plaintiff against the defendant in his speech at the convention. The defendant submitted that

upon a reading of the plaintiff's speech at the convention it was clear that the plaintiff was a racist and that he was opposed to all matters related to the Malay community and their interests and it was to address these matters and the plaintiff's attack on the defendant that this article was written. Alternatively, the defendant claimed the defence of qualified privilege.

Held, awarding the plaintiff damages in the sum of RM200,000 with interest and costs fixed at RM25,000:

(1) Upon applying the general principles of law it was found that the alleged defamatory statements referred to by the plaintiff whether taken in isolation and separately or considered in the context of the whole feature article had the tendency to disparage and injure the plaintiff's standing, character and reputation. Those statements definitely had the tendency to excite the adverse opinion of others against the plaintiff and cast a slur on the integrity of the plaintiff in the office he held in the state of Penang and in his political positions (see paras 16, 21 & 23).

(2) Any response by the defendant, to the plaintiff's alleged attack of the defendant, had its bounds and had to be appropriate and connected to the matters raised in the attack, ie there had to be some proportionality between the attack and the response. From a careful reading of the plaintiff's speech at the convention it was found that there only one reference to the defendant and that there was no attack on the defendant or the Malay community as submitted by the defendant. Further, based on the evidence before it, the court found that the defendant by dragging into the response unconnected issues had transgressed the parameters set in law for such a defence to be accepted (see paras 26–28, 30–33, 35–36).

(3) The defendant's contention that its plea of qualified privilege could not be defeated because the plaintiff had failed to comply with the requirements of O 78 r 3(3) of the Rules of the High Court 1980 ('the RHC') could not stand. This court found that the plaintiff had complied with O 78 of the RHC, in that, he had given notice of a plea of malice and provided particulars of facts or inferences of facts that he would rely upon to negate the defendant's claim of qualified privilege in his statement of reply (see paras 46–48).

(4) Disregard of the basic requirement to verify, which was an integral part of 'responsible journalism' tainted the conduct of the article writer and the defendant and the publishing of the feature article had been done with malice against the plaintiff. The language used and reliance on half-truths led to the inevitable conclusion that the feature article published by the defendant was intentionally made to malign the plaintiff without any cause and most unfairly. The plaintiff had duly proved malice and the defendant's defence of qualified privilege also failed (see paras 49–53).

(5) The defamatory words in the present case were published in a national newspaper commanding a wide readership particularly amongst members of the Malay population. Additionally the quantum of damages ordered should also reflect the court's disdain for anything less than the highest standards of professionalism and responsible journalism being exercised by the print media practitioners. The court thus awarded a single global amount of RM200,000 for general and aggravated damages (see paras 59–65).

[Bahasa Malaysia summary

Plaintif, Menteri Besar Pulau Pinang, yang memegang pelbagai jawatan politik mengatakan bahawa defendan, pemilik, penerbit dan pencetak surat khabar yang dikenali sebagai *Utusan Malaysia*, telah secara salah dan dengan niat memfitnah plaintif menerbitkan artikel bertajuk 'Kebiadaban Guan Eng' ('artikel tersebut') dalam surat khabarnya keluaran 20 Disember 2010. Artikel yang 31 perenggan panjang, juga mengandungi bahagian berkotak di bahagian atas tengah yang jelas dan nyata, yang menyenaraikan dalam bentuk nota 'attitudes and action' plaintif. Plaintif telah memulakan tindakan ini terhadap defendan untuk ganti rugi kerana fitnah bertulis yang timbul daripada penerbitan ini. Menurut plaintif kenyataan-kenyataan berunsur fitnah yang dikatakan itu, sepertimana dikenalpasti dalam tujuh perenggan dalam penyataan tuntutan plaintif, adalah tidak benar dan diterbitkan dengan niat memperkecilkan plaintif kepada masyarakat dan menjejaskan reputasi dan kedudukan sosial plaintif dalam jawatan-jawatan yang dipegang olehnya. Walaupun defendan mengaku menerbit artikel tersebut, ia menegaskan bahawa artikel tersebut telah diterbitkan sebagai maklum balas kepada serangan yang dibuat oleh plaintif terhadap defendan dalam ucapannya di 'Konvensyen Pakatan Rakyat Kebangsaan Kedua' ('konvensyen tersebut') yang diadakan di Pulau Pinang pada 19 Disember 2010. Menurut defendan penerbitan artikel tersebut telah dibuat secara bona fide dan adalah maklum balas yang adil dan relevan kepada serangan yang dikatakan oleh plaintif terhadap defendan dalam ucapannya di konvensyen tersebut. Defendan berhujah bahawa apabila membaca ucapan plaintif di konvensyen tersebut adalah jelas bahawa plaintif seorang yang bersifat perkauman dan bahawa dia membangkang segala perkara berkaitan masyarakat berbangsa Melayu dan kepentingan mereka dan ucapan tersebut adalah untuk mengutarakan perkara-perkara tersebut dan serangan plaintif terhadap defendan bahawa artikel tersebut telah ditulis. Secara alternatif, defendan menuntut pembelaan perlindungan bersyarat.

Diputuskan, mengawardkan plaintif ganti rugi berjumlah RM200,000 dengan faedah dan kos ditetapkan pada RM25,000:

(1) Setelah menggunapakai prinsip am undang-undang adalah didapati bahawa kenyataan-kenyataan berunsur fitnah yang dikatakan telah

dirujuk oleh plaintif sama ada dianggap berbeza dan berasingan atau dianggap dalam konteks keseluruhan artikel tersebut mempunyai kecenderungan untuk memperkecilkan dan menjejaskan kedudukan, perwatakan dan reputasi plaintif. Kenyataan-kenyataan tersebut sememangnya mempunyai kecenderungan untuk membangkitkan pendapat bertentangan orang lain terhadap plaintif dan melemparkan cerca terhadap integriti plaintif dalam jawatan yang dipegang olehnya di negeri Pulau Pinang dan dalam jawatan-jawatan politiknya (lihat perenggan 16, 21 & 23).

(2) Sebarang maklum balas oleh defendan, kepada serangan yang dikatakan oleh plaintif terhadap defendan, mempunyai batas-batasnya dan perlu disesuai dan dikaitkan dengan perkara-perkara yang timbul dalam serangan itu, iaitu perlu ada perkadaran antara serangan dan maklum balas tersebut. Berdasarkan bacaan teliti terhadap ucapan plaintif di konvensyen tersebut adalah didapati bahawa terdapat hanya satu rujukan kepada defendan dan bahawa tidak ada serangan ke atas defendan atau masyarakat Melayu sebagaimana dihujahkan oleh defendan. Bahkan, berdasarkan keterangan yang dikemukakan, mahkamah mendapati bahawa defendan dengan mengheret isu-isu yang tidak berkaitan ke dalam maklum balas tersebut telah melanggar parameter yang ditetapkan dalam undang-undang agar pembelaan sebegini boleh diterima (lihat perenggan 26–28, 30–33, 35–36).

(3) Hujah defendan bahawa rayuannya untuk perlindungan bersyarat tidak boleh dikalahkan kerana plaintif telah gagal mematuhi keperluan-keperluan A 78 k 3(3) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') tidak dapat dikekalkan. Mahkamah ini mendapati bahawa plaintif telah mematuhi A 78 KMT, di mana, dia telah memberikan notis rayuan niat jahat dan mengemukakan butiran fakta atau fakta inferens yang akan digunakan olehnya untuk menyangkal tuntutan perlindungan bersyarat defendan dalam penyataan jawapannya (lihat perenggan 46–48).

(4) Pengabaian keperluan asas untuk mengesahkan, yang merupakan bahagian penting dalam 'responsible journalism' telah tercemar dengan perilaku penulis artikel tersebut dan defendan dan penerbitan artikel tersebut telah dilakukan dengan niat jahat terhadap plaintif. Bahasa yang digunakan dan bergantung kepada perkara yang separuh benar membawa kepada kesimpulan yang tidak boleh dielakkan di mana artikel tersebut telah diterbitkan oleh defendan dengan niat sengaja untuk memburuk-burukkan plaintif tanpa apa-apa sebab dan adalah tidak adil. Plaintif telah membuktikan niat jahat itu dan pembelaan defendan untuk perlindungan bersyarat juga gagal (lihat perenggan 49–53).

(5) Perkataan-perkataan berunsur fitnah dalam kes ini telah diterbitkan dalam surat khabar tempatan yang mempunyai bilangan pembaca yang

meluas di kalangan populasi bangsa Melayu. Tambahan pula kuantum ganti rugi yang diperintahkan hendaklah juga menggambarkan mahkamah tidak boleh menerima suatu yang kurang daripada piawai profesionalisme dan tanggungjawab kewartawanan yang tinggi dilaksanakan oleh pengamal-pengamal media cetak. Mahkamah dengan itu mengawardkan satu jumlah global berjumlah RM200,000 untuk ganti rugi am dan tambahan (lihat perenggan 59–65).]

Notes

For a case on malice, see 2(3) *Mallal's Digest* (4th Ed, 2010 Reissue) para 6090.
For cases on libel, see 12 *Mallal's Digest* (4th Ed, 2011 Reissue) paras 484–645.

Cases referred to

Ayob bin Saud v TS Sambanthamurthi [1989] 1 MLJ 315, HC (refd)
Capital and Counties Bank, Ltd, The v George Henty & Sons (1882) 7 App Cas 741, HL (refd)
Chin Choon @ Chin Tee Fut v Chua Jui Meng [2005] 3 MLJ 494, CA (refd)
Chok Foo Choo @ Chok Kee Lian v The China Press Berhad [1999] 1 MLJ 371, CA (refd)
Dato' Seri Anwar bin Ibrahim v The New Straits Times Press (M) Sdn Bhd & Anor [2010] 2 MLJ 492; [2010] 5 CLJ 301, HC (refd)
Jameel Mohamed and another v Wall Street Journal Europe SPRL [2006] UKHL 44; [2007] 1 AC 359, HL (refd)
Jones v Skelton [1963] 3 All ER 952, PC (refd)
Penton v Calwell (1945) 70 CLR 219 (refd)
Ratus Mesra Sdn Bhd v Shaik Osman Majid & Ors [1999] 3 MLJ 529; [1999] 8 CLJ 499, HC (refd)
Reynolds v Times Newspaper Ltd [2001] 2 AC 127, HL (refd)
Roshairee bin Abdul Wahab v Mejar Mustafa bin Omar & Ors [1996] 3 MLJ 337; [1997] 1 CLJ Supp 39, HC (refd)
Syed Husin Ali v Sharikat Perchetakan Utusan Melayu Berhad & Anor [1973] 2 MLJ 56 (refd)
Trad v Harbour Radio Pty Ltd (2009) NSWBC 750, CA (refd)
Tun Datuk Patinggi Hj Abdul-Rahman Ya'kub v Bre Sdn Bhd & Ors [1996] 1 MLJ 393, HC (refd)
WLP Industrial Solutions (M) Sdn Bhd v KL-Kepong Rubber Products Sdn Bhd [2011] 6 MLJ 623, HC (refd)

Legislation referred to

Defamation Act 1957 s 12
Federal Constitution art 10
Rules of the High Court 1980 O 78 r 3(3)

Jagdeep Singh Deo (Karpal Singh & Co) for the plaintiff.
Mohana Kumar (Shafie & Mohan) for the defendant.

Varghese George J:

[1] This was an action by the plaintiff against the defendant for damages in libel allegedly arising from material printed and published in a daily newspaper with a wide circulation in the nation.

[2] The plaintiff was at the material time of the publication the Chief Minister of the State of Pulau Pinang, the Member of Parliament for the Bagan Parliamentary Constituency and the State Assembly Member for the State Constituency of Air Puteh. The plaintiff was also the Secretary-General of the Democratic Action Party ('DAP').

[3] The defendant admitted that it was the owner, publisher, and printer of the newspaper under the banner name *Utusan Malaysia* on weekdays (and *Mingguan Malaysia* on Sundays) where the alleged defamatory material was published and circulated.

[4] It was the plaintiff's allegation that the defendant had wrongfully and with intention to defame the plaintiff published in the *Utusan Malaysia* issue of 20 December 2010 an article under the title 'Kebiadaban Guan Eng' and in para 4 of the statement of claim the following paragraphs from the contents of that article were specifically identified to have defamed the plaintiff:

> Jika ucapan Lim Guan Eng di Konvensyen Pakatan Rakyat yang berlangsung di Kepala Batas, semalam diambil kira, Setiausaha Agung DAP itu tidak boleh marahkan sesiapa kalau beliau dianggap bersikap rasis dan menentang apa sahaja yang berkaitan dengan Melayu.
>
> [1]
>
> Gambaran yang cuba diberikan oleh Guan Eng secara tersirat ialah apa sahaja perjuangan yang berkaitan dengan Melayu tidak harus dibiarkan dan harus ditentang oleh pakatan pembangkang yang turut dianggotai oleh Parti Keadilan Rakyat (PKR) dan PAS.
>
> [4]
>
> Kedua-dua parti berkenaan sememanganya diketuai oleh orang Melayu tetapi apabila Guan Eng menyerang orang Melayu dan institusi Melayu mereka hanya menyokong.
>
> [5]
>
> Orang Melayu tidak mendapat apa-apa malahan ditindas satu demi satu satu perkampungan mereka dilenyapkan di bumi Pulau Pinang atas nama pembangunan.
>
> [9]

Perarakan Maulidur Nabi pula dihalang dan peniaga Melayu dicegah berniaga di KOMTAR di bulan Ramadhan, apakah ini pemimpin yang tidak rasis dan mengutamakan semua kaum?

[10]

Tetapi apakah Guan Eng, rakyat Malaysia tulen apabila mengusir penduduk kaum India di Kampung Buah Pala dan menghalau penduduk Melayu di Kampung Genting semata-mata untuk membina sebuah cawangan universiti.

[12]

Sebab itulah Guan Eng mahupun DAP tanpa segan silu atau rasa bersalah menyerang institusi Melayu dan melakukan tindakan menyinggung orang Melayu

[28]

(The number in parenthesis given at the foot of each of the identified defamatory statements above denotes the number of the corresponding seven paragraphs in the article published on 20 December 2010, which in total contained 31 paragraph and other highlighted material.)

[5] At para 5 of the statement of claim, the plaintiff went on to claim that given the ordinary and natural meaning of the words contained therein, the identified defamatory statements meant or was intended to bear or had in effect one or all of the following imputations:

(a) beliau adalah bersikap rasis dan menentang apa sahaja yang berkaitan dengan Melayu.

(b) beliau di Konvensyen Pakatan Rakyat memberi gambaran bahawa apa sahaja perjuangan yang berkaitan dengan Melayu tidak harus dibiarkan dan harus ditentang oleh pakatan pembangkang

(c) beliau menyerang orang Melayu dan institusi Melayu;

(d) beliau menindas orang Melayu dengan melenyapkan satu per satu perkampungan mereka di Pulau Pinang;

(e) beliau membatalkan perarakan Maulidur Nabi;

(f) beliau mencegah peniaga Melayu berniaga di Komtar pada bulan Ramadan;

(g) beliau merobohkan Kampung Buah Pala dan perkampungan Melayu di Kampong Genting dan Kampung Pokok Asam; dan

(h) beliau menggunakan dana dari sumber perjudian bagi program warga emas.

[6] The plaintiff further claimed that the alleged defamatory statements were untrue and had been published with intention to disparage the plaintiff in public and to lower the plaintiff's reputation and standing socially and in the offices he held (paras 7 and 8 of statement of claim).

[7] The defendant in the statement of defence admitted publishing the

aforementioned article in the 20 December 2010 issue of *Utusan Malaysia* concerning the plaintiff but contended that it was published as a response to what was described as an 'attack' on the 'Defendant' by the plaintiff in a speech made by the plaintiff at the 'Konvensyen Pakatan Rakyat Kebangsaan Kedua' held at Kepala Batas, Pulau Pinang on the previous day, 19 December 2010 ('konvensyen'), which speech, it was also alleged, had been circulated amongst the public and also made available on websites.

[8] The defendant denied however that the complained words bore or was capable of bearing the meaning attributed to it by the plaintiff and/or it was defamatory of the plaintiff (para 9 of the statement of defence)

It was claimed by the defendant that the publication of the article was made 'bona fide' and was a fair and relevant response to the alleged attack against defendant by the plaintiff at the konvensyen on 19 December 2010.

[9] Additionally or alternatively, it was the defendant's defence that the article was published 'on an occasion of qualified privilege at common law'. At para 13.5 of the statement of defence, the defendant then went on to set out excerpts from the plaintiff's speech at the konvensyen which according to the defendant, related to 'Utusan Malaysia' and its followers and supporters, ('berhubung dan mengenai akhbar Utusan Malaysia … dan pendokong-pendokong dan peminat- peminatnya').

THE UTUSAN MALAYSIA ARTICLE OF 20 DECEMBER 2010

[10] It was not in dispute that the article in question was not a report of what had transpired at the *konvensyen*; a separate report on the event appeared elsewhere in the same issue of *Utusan Malaysia* (the evolving defence of 'reportage' available to the media was excluded in such circumstances).

It was a 'feature article'. A 'rencana' as was confirmed by the author of the article ('DW3'), written separately and intentionally for publication under direction or with approval of the newspaper's editors. This particular perspective of the article, namely, that it was a feature article, was a material factor, in my view, to be taken into consideration when determining the controversy, claims and defences that have arisen between the parties in this action. In other words, it was not a report of an event or what transpired at the event and the defendant had an option not to publish it but had intentionally chosen to do so.

[11] The title of the feature article was 'Kebiadaban Guan Eng' (*Biadab*: insolence, arrogance, rude, uncivilised, uncouth) and obviously was intended to draw the attention of readers of the daily to the contents of that article.

The feature article was not just 31 paragraphs in length, in normal print but, I should add, it included a prominent and distinct 'boxed' portion at the top

centre of the article in an enhanced print (referred in the industry commonly as 'stand first' or 'nutgraph). This bore a sub-heading 'Antara sikap dan tindak-tanduk Guan Eng' and immediately below were listed 11 statements of events or facts presented in bullet form, purportedly which appear to have been the indicators of the 'attitudes and action' of the plaintiff. Assumedly, this also formed the focus of the feature article with the plaintiff as the only subject.

THE TEXT OF THE PLAINTFF'S SPEECH AT THE KONVENSVEN

[12] A transcript of the video recording of the plaintiff's speech on 19 December 2010 at the *konvensyen* and also the official text of the same speech as downloaded on the website of the Penang State Government and the plaintiff's Facebook were also before the court. There was no serious dispute as between the parties on the contents of the text which corresponded one with the other, save for a few minor insignificant variations.

APPROACH TO BE TAKEN BY COURT IN DEFAMATION ACTIONS

[13] There are two stages involved when the merits of a defamation action were up for adjudication by the court. It had been consistently ruled by our courts that the burden of proof initially would be upon the plaintiff to show that:

(a) the statements or words complained of were capable to have or had the tendency of bearing a defamatory meaning;

(b) the statements or words referred to the plaintiff; and

(c) the statements or words which formed the subject or the action had indeed been 'published' (ie in its technical sense)

(see *Ayob bin Saud v TS Sambanthamurthi* [1989] 1 MLJ 315).

[14] Only after the three elements required of the plaintiff had been satisfied, would the burden shift to the defendant, in the second stage of the enquiry that is, to prove on credible evidence the pleaded defence(s) of the defendant and/or that the alleged words or statement were not defamatory.

[15] The Court of Appeal in *Chok Foo Choo @ Chok Kee Lian v The China Press Berhad* [1999] 1 MLJ 371 speaking through Gopal Sri Ram JCA (as His Lordship then was) said that the *first stage* involved a *question of law* to be undertaken by the court and turned on the construction to be given to the words complained. *The second stage* called for *assessment on the facts* whether in any particular case, the words complained of were defamatory. The relevant passage from the judgment to that effect is best reproduced and was as follows:

A It cannot, I think, be doubted that the first task of a court, in an action for defamation, is to determine whether the words complained of are capable of bearing a defamatory meaning. And it is beyond argument that this is in essence a question of law that turns upon the construction of the words published.

B Having decided whether the words complained of are capable of bearing a defamatory meaning, the next step in the enquiry is for a court to ascertain whether the words complained of are in fact defamatory. This is a question of fact dependent upon the circumstances of the particular case.

C **[16]** In the instant case, as noted earlier, there was no dispute that the complained statements (and indeed the feature article itself) referred to the plaintiff and that the article had been 'published' and disseminated.

The only question for evaluation then before the court under the first stage of the process was the construction to be given to the statements complained and D whether those statements were capable of or had the tendency of bearing a defamatory meaning of the plaintiff.

[17] In that respect, as often affirmed by the courts, a statement capable of being defamatory was one which had a tendency to injure the reputation of the E person, that is to say, to lower him (or her) in the estimation of right thinking members of society generally (amongst other effects). *Gatley on Libel and Slander*, (11th Ed), at p 12 para 1.8 further states:

F The question 'what is defamatory?' relates to the nature of the statement made by the defendant: *words may be defamatory even if they are believed by no one …* (Emphasis added.)

[18] In *Syed Husin Ali v Sharikat Perchetakan Utusan Melayu Bhd & Anor* [1973] 2 MLJ 56, Mohamed Azmi J (as His Lordship then was) in reiterating G this principle stated:

Thus, the test of defamatory nature of a statement is its tendency *to excite against the plaintiff the adverse opinion of others, although no one believes the statement to be true.* Another test is: would the words tend to lower the plaintiff in the estimation of right H thinking members of society generally. (Emphasis added.)

[19] Further in, *Tun Datuk Patinggi Hj Abdul-Rahman Ya'kub v Bre Sdn Bhd & Ors* [1996] 1 MLJ 393, Richard Malanjum J (as His Lordship then was) on the issue of how the words complained of should be construed, had this to say:

I

It is not confined to strict literal meanings of the words complained of, but extends to any reference or implication from which persons can reasonably draw. Further, *the words complained of must be considered as a whole, bearing in mind, inter alia, the context in which they were used.* (Emphasis added.)

Richard Malanjum J in the aforesaid case also made reference to the observation of Lord Selborne LC in *The Capital and Counties Bank, Ltd v George Henty & Sons* (1882) 7 App Cas 741 (at p 745) which was as follows:

> The test according to authorities is whether, under the circumstances in which the writing was published, *a reasonable man to whom the publication was made would be likely to understand it in a libelous sense.* (Emphasis added.)

[20] It was also a principle recognised in law that in construing words published in an article, the whole article could be considered when determining whether the words complained of contain any defamatory imputation. RK Nathan J in *Ratus Mesra Sdn Bhd & Shaik Osman Majid & Ors* [1999] 3 MLJ 529; [1999] 8 CLJ 499 observed as follows:

> It was argued by the defendants that the plaintiff had not identified the specific words or sentences that are defamatory of them. To my mind the law of defamation would remain impotent if the court were to put such a narrow and simplistic interpretation. Not only words and sentences can be defamatory, it is also possible, after reading the entire article, to hold that the said article read as a whole is defamatory of the plaintiff *because of the claim of events entwined throughout the article, to form a tapestry, that portrayed the plaintiffs as the ones defamed.*

[21] In undertaking the initial exercise I had to only construe the seven paragraphs as identified by the plaintiff in the statement of claim, that is, as to whether those statements were capable of or had the tendency to have such a defamatory effect on the plaintiff as claimed. In this respect, the court is not however precluded from talking into account the context in which those statement were made, which in this case was the whole of the feature article entitled 'Kebiadaban Guan Eng' and the material allegedly implicating the plaintiff's character contained or highlighted there.

In this respect, counsel for the defendant conceded in his written submission that the court was perfectly entitled to construe the complained statements in the context of the whole article and that submission was in the following terms:

> That is of course not to say that Your Lordship is not entitled to take into account the contents of the whole article in construing the imputation that the words complained of bear in the context of the entire article for the purposes of determining whether in their natural and ordinary meaning the words complained are capable of and are in fact defamatory of the plaintiff in particular circumstances of the case.

[22] Also in *Chok Foo Choo*, Gopal Sri Ram JCA citing with approval Lord Morris in *Jones v Skelton* [1963] 3 All ER 952, noted that the *ordinary and natural meaning of words may be either the literal meaning or it may be an implied or inferred or an indirect meaning: any meaning that does not require the support*

of extrinsic facts passing beyond general knowledge but is a meaning which is capable of being detected in the language used, can be part of the ordinary and natural meaning of words. Gopal Sri Ram JCA went on to say:

> In my judgment, the test which is to be applied lies in the question: *do the words published in their natural and ordinary meaning impute to the plaintiff any dishonorable or discreditable conduct or motive or a lack of integrity on his part?* If the question invites an affirmative response, then the words complained of are defamatory. (Emphasis added.)

[23] Upon applying the guiding principles of law as recalled and stated above, I found that the seven paragraphs complained of by the plaintiff *either* taken in isolation and separately or even if each of the statements/paragraphs were considered in the context of the whole feature article itself, in its natural and ordinary meaning definitely had the tendency to disparage and injure the plaintiff's standing, character and reputation. Those statements definitely had the tendency to excite against the plaintiff the adverse opinion of others, especially readers of the *Utusan Malaysia* from the Malay community. It was clearly capable of casting a slur on the integrity of the plaintiff in the office he held in the State of Penang and in his political positions.

THE DEFENCE

[24] As alluded to earlier, the defence in this case was essentially two fold. I would summarise them as follows:

(a) the statements complained of by the plaintiff, as was also the feature article itself, was 'a fair and reasonable' answer or response to an attack on the defendant that had been in the first place mounted by the plaintiff in the plaintiff's speech at the konvensyen, the text of which had been circulated widely as well; and

(b) the statements in respect of the plaintiff that had been published was protected or insulated by *qualified privilege in common law* and in this regard, the privilege prevailed as the plaintiff had firstly, failed to plead 'malice' or of particulars of the malice to rebut that privilege and/or that on the facts, the plaintiff's had failed to prove 'malice' in any event.

[25] In my view the better approach to be taken was to treat both the said defences as distinct defences although there was likely to arise some overlaps in the facts or inferences of facts to be taken into account in evaluating them.

ANSWER OR RESPONSE TO ATTACK

[26] This defence was one that was generally available in law to repel a claim

for damages arising from alleged defamation and was not restricted to 'newspapers' or other 'media', as was the case of the defence of 'qualified privilege in common law' (further discussed later in this judgment).

Gatley on Libel and Slander, (11th Ed), at pp 503–504, in the commentary on this defence summarises the position drawn from decided authorities as stipulating:

(a) the response to an 'attack' *must not make counter-charges wholly unconnected with the attack and irrelevant to the defendant's vindication*;

(b) the defence or privilege *extends only so far* as to enable the defendant *to repel the charges brought against him, not to bring fresh accusations against his adversary*, and

(c) that where the counter *attack was on the credibility of the plaintiff*, the *mere retaliation*, which cannot be described as an answer or explanation, *was not protected*.

[27] Even the authorities cited by defendant's counsel in his submission affirm similar parameters as the principles that had to be borne in mind and applied in such scenario. In *Penton v Calwell* (1945) 70 CLR 219 Dixon J observed that the defendant must be recognised to have a right to answer — 'to bring to the minds of those before whom the attack was made any bona fide answer or retort bv way of vindication which appears fairly warranted by the occasion'.

The emphasis in my view was, it ought to be a *bona fide answer or explanation* as was 'fairly' necessary or warranted in the particular circumstances of each case. In *Trad v Harbour Radio Pty Ltd* (2009) NSWBC 750, (a media case), the Supreme Court of New South Wales, Australia in no uncertain terms stated that *there must be some proportionality between the attack and the response.*

[28] It was manifestly clear therefore that any 'offensive' that the defendant decided to embark upon in response should not include *irrelevant and extraneous material* which was not subject of the so called 'attack'. It also went without saying that such answer or response should be grounded on facts as otherwise it would naturally draw a presumption of 'mala fides' on the part of the defendant and consequently the existence of 'malice' behind the publication of the answer or explanation.

[29] This court therefore had to make the following evaluation from the perspective of the evidence that was before it:

(a) what was the 'attack' made on the defendant by the plaintiff in the plaintiff's speech at the konvensyen, and

(b) whether the defendant's response or answer as stated in the seven

paragraphs complained of by the plaintiff, even if taken individually or otherwise considered in the context of the whole of the feature article,

(i) was relevant and bore a connection with that alleged 'attack'; and

(ii) was a fair and proportionate answer or explanation without inclusion of extraneous matter.

[30] For a start, it must be noted that there was only *one reference to 'Utusan Malaysia' in the whole speech of the plaintiff at the konvensyen*. That part of the speech where that reference is found as extracted from the text published in the official website of the State Government was in the following words:

> Saya ingin mula dengan mereka yang hanya tahu benci-membenci dengan menggunakan fahaman extremis baik aspek kaum, jantina mahupun agama. Golongan yang hanya tahu mendiskriminasi, menganiayai dan merendahkan orang lain malah meraikan peristiwa berdarah 13 Mei bukanlah rakyat Malaysia sebenar. Kebanyakan mereka pendokong dan peminat Utusan Malaysia dan BN yang hanya peralatkan isu 3R (race, religion, raja)
>
> Satu lagi golongan ialah yang bukan 'real Malaysian' adalah yang tamak haloba …

[31] What I was able to deduce from the reading of the plaintiff's speech at the *konvensyen* was that the overall thrust of the speech was the plaintiff's postulations as to what was wished for or sought for by 'real Malaysians' ('Rakyat Malaysia sebenar mahukan …').

At the outset of the speech the plaintiff identified various groups who were not 'real Malaysians' ('bukan rakyat Malaysia sebenar, bukan rakyat Malaysia tulen'). Amongst the few groups highlighted was one described by the plaintiff as — 'yang hanya tahu mendiskriminasi, menganiayai dan merendahkan orang lain malah meraihkan peristiwa berdarah 13 Mei'.

The plaintiff then proceeded to state that a major portion in this group were supporters or followers of 'Utusan Malaysia' and of BN who exploited the issues of 'race, religion, raja' (the 3Rs) ('Kebanyakan mereka pendokong dan peminat Utusan Malaysia dan BN yang hanya peralatkan isu 3R').

[32] DW3 (who was the writer of the article) had in his testimony before the court agreed that:

(a) the theme of the plaintiff's speech at the *konvensyen* was 'Siapakah Rakyat Malaysia yang sebenar or tulen';

(b) *Utusan Malaysia* had previously carried a suggestion by one of its columnists that 13 May 'mesti diperingati', meaning commemorated or 'honoured' by its observation;

(c) the various 'issues' or the allegation as to the 'sikap dan tindak tanduk' of

the plaintiff carried in the article and/or which was referred in the seven complained paragraphs had *not* featured or had been raised in any manner in the course of the plaintiff's speech at the *konvensyen*;

(d) there was nothing 'racial' (by which I understood to be-racially provocative to the Malay community as a whole) in the plaintiff's speech at the *konvensyen*; and

(e) the majority of the participants at the *konvensyen* were from the Malay community and there was reportedly no adverse reaction from them to the plaintiff's speech at the *konvensyen* if it was a 'racial' attack at all.

He also very significantly agreed with counsel for the plaintiff that if matters or issues raised in the feature article ('rencana') written by him was not the truth or in substance the truth, then it amounted to 'fitnah' (libel, slander) on the plaintiff.

[33] DW3 however maintained that contents of the rencana was 'relevant' as, according to him, being a 'rencana' (feature article), what was written by him and published by the defendant was not restricted to matters raised in the plaintiff's speech at the *konvensyen*.

However in my view, the writing of a feature article with specific reference being made to the plaintiff's speech at the *konvensyen* and expressly identified as its immediate context (see para 1 of the article) did not give a free license to DW3 or the defendant to include irrelevant or extraneous matter in the so called 'fair and reasonable answer or response'.

It had to be borne in mind that any such response or retort had its bounds and had to be appropriate and connected to the matters raised in the 'attack' and not in any event by dragging into the response unconnected issues, the truth or falsity of which was another issue altogether.

I could not therefore agree with DW3 and his claim for flexibility and latitude in the case of this feature article, which without any doubt, on the face of it did not confine itself to what the plaintiff identified *Utusan Malaysia* with in the plaintiff's speech at the *konvensyen* but here the 'rencana' went on to single out the plaintiff on a 'racism' charge or alleged 'racist' attitude or policies.

[34] Counsel for the defendant in his written submission referring to the plaintiff's speech at the *konvensyen* argued that 'the Plaintiffs attack on Utusan Malaysia was in the most sweeping and widest terms, alleging, to say the least, subversive, unpatriotic and selfish behavior of a very serious nature'.

Further in his closing written submissions, counsel went on in similar vein to state:

Plaintiff in his speech at the Konvensyen had made sweeping and provocative allegation against the Defendant, the Defendant had in fact reacted with some warmth in the face of real provocation.

[35] I must say I could not discern any such 'sweeping' or any 'attack' in the 'widest terms' or any 'provocation' on *Utusan Malaysia*, or for that matter on the Malay community, as suggested by counsel for the defendant in his submission, from my careful reading and rereading of the text of the plaintiff's speech at the *konvensyen* in its entirety or of that part where there was one reference to *Utusan Malaysia*. That part of counsel's submission was mere rhetoric not supported by the reality of the contents of that article and should be outright dismissed.

[36] The law only recognised 'an answer or response' as a proper defence in a defamation suit, if such response was reasonable and appropriate and in this instant case restricted or limited to the objectionable part of the plaintiff's speech which made reference to 'Utusan Malaysia' specifically.

It was obvious that the defendant had transgressed the parameters set in law for such a defence to be accepted as a valid one. Quite clearly, extraneous and unconnected matters were raised in the seven paragraphs complained, and even in the feature article overall, by the defendant.

[37] There would have been some merit in this line of defence taken by the defendant if the 'rencana' (feature article) addressed and rebutted with relevant facts or material and in a measured language that neither the defendant nor its 'pendokong dan peminat' were in the category of people named by the plaintiff as 'hanya tahu mendiskriminasi, menganiayai dan merendahkan orang lain malah meraihkan peristiwa berdarah 13 Mei' or even in the category of 'mereka yang hanya tahu benci-membenci dengan menggunakan fahaman extremis, baik aspek kaum, jantina mahupun agama'. That was not the case here.

What was present here on the other hand was the writer embarking upon a tirade' of accusations or allegations personally against the plaintiff based on 'extraneous' matters, which 'response or answer' was totally unsustainable in any event as a proportionate response in the circumstances.

[38] Inevitably therefore this defence failed even if one was to give a most charitable reading to the contents of the seven paragraphs complained and/or taking the whole contents of the feature article itself.

I should add that it was to allow a full ventilation of all relevant matters to assist the court in the above assessment that I allowed *both parties* to adduce evidence not just restricted to the contents of the seven complained paragraphs, despite the objections registered by counsel for the defendant.

QUALIFIED PRIVILEGE IN COMMON LAW

[39] The *qualified privilege in common law* available to a newspaper or other media-related entities in the context of defamation actions against them, was a *special defence* deriving its basis from the duty of the press to the public at large.

It was unlike the defence of 'absolute privilege' (where no legally recognisable claim would be recognised at all) or the 'classical' form of qualified privilege (or its statutory reenactment, for example, as found in s 12 of our Defamation Act 1957) which had as its very foundation the special treatment accorded in law to the 'occasion' of the publication of the alleged material, which would have otherwise been defamatory in ordinary course of events.

This category of qualified privilege in common law traced its development and recognition to the decision of the House of Lords in the case of *Reynolds v Times Newspaper Ltd* [2001] 2 AC 127. Australia and New Zealand had also variants of this same defence of qualified privilege that could be availed of by print or other media practitioners. My brother Harminder Singh Daliwal JC, has admirably collated and summed up the respective position in those jurisdictions on this subject, in His Lordship's judgment in *Dato' Seri Anwar bin Ibrahim v The New Straits Times Press (M) Sdn Bhd & Anor* [2010] 2 MLJ 492; [2010] 5 CLJ 301.

[40] Suffice it for me for the purposes of determining the issues in this action to refer to *Gatley on Libel and Slander*, (11th Ed), at para 14.2 (p 439) where it is commented as follows:

> The Reynolds category is not confined to publication through the 'media', though in practice that will be the context of almost all the cases. The very existence of the privilege in this type of case, however, is a matter which involves a closer scrutiny of the facts of the particular case. It involves questions like the extent to which the defendant took steps to verify the information he imparted, the urgency of the matter, the extent of the public's 'right to know' about it and whether the defendant has sought any explanation or comment from the person about whom the statement is made.

[41] Again in *Gatley*, at para 15.3 (at p 520) it is noted that Lord Nichols's in this *Reynolds* case had set out a non-exhaustive list of circumstances, which would be relevant to this privilege issue in a 'media' case, amongst which were the following:

(1) The seriousness of the allegation. *The more serious the charge, the more the public is misinformed and the individual harmed, if the allegation is not true.*

(2) The nature of the information and the extent to which the subject matter is a matter of public concern.

(3) …

(4) *The steps taken to verify the information.*

(5) …

(6) The urgency of the matter. News is often a perishable commodity.

(7) *Whether comment was sought from the plaintiff.* He may have information others do not possess or have not disclosed. An approach to the plaintiff will not always be necessary.

(8) *Whether the article contained the gist of the plaintiff's side of the story.*

(9) *The tone of the article.* A newspaper can raise queries or call for an investigation. *It need not adopt allegation as statement of facts.*

(10)…

[42] The underlying basis of the *Reynold*'s type privilege has been often described on 'responsible journalism'. This principle was applied in the later House of Lords decision in *Jameel Mohamed and another v Wall Street Journal Europe SPRL* [2006] UKHL 44; [2007] 1 AC 359, although it was opined there that the question of 'responsible journalism' (as spelt out in *Reynold*'s case) should be approached in a practical and more flexible manner. In *Jameel*'s case evidence was led to show that the journalist/correspondent had sought *Jameel*'s comments on the morning before the publication and the House of Lords was of the view that steps taken to gather and publish the information was responsible and fair in that particular fact situation.

[43] The law on whether 'malice' was still relevant in this *Reynold*'s type of qualified privilege in common law (the traditional form of qualified privilege is defeated by the proof by claimant of malice on the part of the defendant) was not very clear (see para 15.8 in *Gatley's*: *Irrelevance of malice*).

[44] However as for me I was bound to and guided by O 78 r 3(3) of the Rules of the High Court 1980. In effect that procedural provision required the plaintiff who wishes to demolish the defence of privilege on the grounds that the defamatory statements were actuated by express malice, to file 'a reply giving particular of the facts and matter from which the malice is to be inferred'.

'MALICE' AND WHETHER IT HAD BEEN PLEADED

[45] The question that I had to then determine was whether the plaintiff had complied with the requirements of O 78 r 3(3) of the Rules of the High Court 1980. The defendant on the one hand contended that malice or particulars of alleged malice had not been pleaded by the plaintiff. The plaintiff on the other hand maintained that they had duly complied with the requirements of that rule and specifically referred to para 11 of the statement of reply filed for the plaintiff.

The said para 11 of the statement of reply is reproduced here for a better appreciation of its contents.

> 11. Berkenaan perenggan 18 Pernyataan Pembelaan, Plaintif mengulangi bahawa *defendan berniat jahat* dan *butir-butir niat jahat tersebut adalah seperti berikut*:
>
> (a) Defendan langsung tidak meverifikasikan maklumat dan ataupun sumber maklumat dan seakibatnya menulis dan menyebabkan untuk disiarkan perkataan-perkataan yang diadukan tersebut;
>
> (b) Defendan bertindak secara melulu tanpa menghiraukan langsung perasaan Plaintif;
>
> (c) Defendan langsung tidak memohon maaf kepada (plaintif-plaintif) walaupun mereka sememangnya mengetahui keadaan yang sebenar;
>
> (d) Defendan tidak menghiraukan penyiaran perkataan-perkataan yang diadukan tersebut dan telah memfitnahkan plaintif *dengan cuai dan niat jahat yang diatur-kira* untuk mengaut keuntungan bagi pihak defendan yang berkemungkinan akan melebihi gantirugi yang akan diawadkan kepada plaintif di dalam tindakan di sini, di mana defendan juga berhasrat untuk memperolehi satu peningkatan di dalam penjualan akhbar harian defendan yang tersebut;
>
> (e) Kerosakan yang dialami oleh plaintif telah ditambah teruk dengan niat jahat yang tiada had ('unadulterated malice') oleh pihak defendan yang bertujuan dan berniat untuk menghancurkan kerjaya politik pihak plaintif. (Emphasis added.)

[46] I have given the statement of reply and in particular para 11 of the same, my anxious consideration in the light of the persistent and repeated submissions of counsel for the defendant that there was no 'malice' pleaded by way of reply by the plaintiff and/or that 'particulars' of malice had not been provided. Counsel for the defendant therefore argued that the plea of qualified privilege raised by the defendant against the claim of the plaintiff could not be defeated. It was understandable why counsel for the defendant wanted this outcome, as obviously that, as appeared, was the only avenue open for the defendant to escape liability in this action.

I hold that in para 11 of the statement of reply the plaintiff had expressly set out a plea of malice ('defendan berniat jahat') and there were also particulars ('butir-butir niat jahat tersebut adalah …') included in that paragraph *to give sufficient notice to the defendant of the case to be met* by the defendant if their plea of qualified privilege was not to be defeated.

[47] The contention of the defendant's counsel that the particulars provided was a mere recital or regurgitation of the particulars found at para 9 of the statement of claim (in support of prayers for aggravated and exemplary damages), did not in my view, in any way detract from the intent and purport of para 11 of the statement of reply, namely to give *notice of a plea of malice* and to provide *particulars of facts or inferences of facts* that would be relied upon by

the plaintiff to negate the defendant's claim of qualified privilege.

MALICE AND SUBSTANCE OF THE SEVEN COMPLAINED PARAGRAPHS

[48] Following from the above it was incumbent upon this court to deal in some detail with each of the seven complained paragraphs and the plaintiff's claim that the contents of those paragraphs were not only untrue but its publication was motivated by malice against the plaintiff.

(a) I could not find any statement from within the text of the plaintiff's speech at the konvensyen which rationally could in the remotest way support this sweeping statement which implied that the plaintiff was a racist and a threat to the Malay community and their interests. It was, in my assessment, totally rash and irresponsible for DW3 to make that statement or imputation on the character of the plaintiff for no obvious reason and the defendant for approving it for printing and circulation.

In respect of para 1, the opening paragraph of the 'rencana', DW3's statement there in its ordinary meaning meant that 'no one should be defaulted if, upon a reading the plaintiff's speech at the Konvensyen, one came to the conclusion that the Plaintiff was a racist in attitude and was opposed to all matters related to the Malay community'.

All the other complained paragraphs were by the words of this opening paragraph of the article anchored on that speech of the plaintiff at the konvensyen. DW3 in his testimony did not dispute this or identify any other primary source material to ground those statements.

(b) As regards para 4 of the 'rencana' DW3 appear to suggest that the plaintiff had an indirect motive to put a stop (together with PKR and PAS) to any cause related to the Malay community.

It was not shown where such disguised motive could be inferred from in the context of the plaintiff's speech at the konvesyen. There was no denying that this statement clearly intended to excite the readers against the plaintiff and to colour the plaintiff unfairly and without basis, as person who held a 'prejudice' against one race.

(c) Counsel for the defendant submitted that the plaintiff was not the target here but and if there was any complaint in regard to para 5 of the article it ought to have been made by PKR and/or PAS. However in my view the real sting in para 5 of the 'rencana' was that the plaintiff had attacked ('serang') the Malay community and Malay institutions.

Was there an attack by the plaintiff in his speech at the *konvensyen* on the Malay community or Malay institutions? I was not shown any and neither could I find one upon perusal of the text of the speech.

Perhaps it was appropriate to observe here that even if there was such an attack as alleged, it was not for the defendant to assume for itself the position of

'Malay Institution' or abrogate to itself the alleged role of one of the defender of the Malay community or of a Malay institutions.

In the eyes of the law all tortfeasors were to be dealt equally unless by statute there was provided for some peculiar safeguard or limitation. The defendant did not have any such status recognised in law to exempt it from the strictures of the law related to defamation.

(d) In para 9 of the rencana DW3 presents a alleged 'factual' scenario that one by one 'perkampungan Melayu in Pulau Pinang' have been demolished or terminated in the name of development.

The allegation made here by DW3 appeared to be related to the claimed events highlighted by bullet 10 and 11 in the 'boxed' portion of the article, namely:

- Merobohkan perkampungan orang Melayu di Kamping Jalan Pokok Asam.
- Merobohkan perkampungan orang Melayu di Kampung Genting, Balik Pulau bagi membina sebuah universiti di kawasan itu.

To the contrary, there was evidence led to show that in respect of Kampung Jalan Pokok Asam, the demolition was a consequence of the lack of proper building approval and in respect of Kampung Genting, Balik Pulau no such demolition had taken place even to the present.

To link such untruths to the alleged 'Kebiadaban Guan Eng' was. to say the least, mischievous and put forward purely to cast unfounded aspersions on the plaintiff based on distorted facts.

(e) In regard to para 10 of the rencana and DW3's allegation there that *perarakan Maulidur Rasul* was hindered and further the Malay traders were prohibited to trade during Ramadhan at KOMTAR, there was evidence that was led by the plaintiff before me to show as a matter of fact that no such obstruction or prohibition as alleged had occurred.

The defendant did adduce evidence on the other hand to show there was some initial 'letter' which indicated that the *perarakan Maulidur Rasul* would be cancelled for 2010 but it was conceded by witnesses for the defendant that the perarakan did take place ultimately as annually held. Even if there was such initial moves (on the part of State Government) to cancel the same, DW3 was obliged to set out the full sequence of developments and state that it went on finally, as opposed to the impression left for a reader of the statement in para 10 now, that the

perarakan was cancelled and not held at all. DW3 most definitely and intentionally chose to suppress crucial facts related to the issue from the readers in this case.

Similarly in respect of the Ramadhan Bazaar at KOMTAR, DW6 for the defendant under cross-examination agreed that the faxes he received did not in fact or in effect prohibit the holding of the Bazaar but that there were certain conditions imposed by PDC, the owners of KOMTAR, which had to be fulfilled but which the stall holders were unhappy about.

The point to be highlighted arising from the above was that DW3 although he had a duty to conduct himself as a 'responsible journalist' had resorted to stating or putting out *half truths* to attack the plaintiff, who in any event was not shown to be the direct perpetrator of the alleged actions to cancel the perarakan or to curtail the Ramadan Bazaar.

Half truths are no truth at all and definitely bear out an intention to deliberately mislead and malign unfairly the party who was the subject of such statement, in this case, the plaintiff.

(f) DW3 in para 12 of the 'rencana' present a picture of the plaintiff being the cause for the eviction of Indian members of the community from Kampung Buah Pala and the Malay community from Kampung Genting.

It has been shown to the satisfaction of the court that the eviction of residents in Kampung Buah Pala was the result of a dispute between the developer of the land in question and the residents and pursuant to court orders obtained by the developer. In fact the plaintiff was not involved in that dispute and the State Government though had attempted to assist the aggrieved residents. Save for nine families, all former residents had been resettled on amicable terms. The nine households were engaged in an ongoing court case presently.

As earlier commented, the residents in Kampung Genting had also not been forced out or had moved out as alleged by DW3 in that paragraph. A notice issued in respect of an intended land acquisition was in any event on hold presently.

The statements made by DW3 in para 12 of the article and carried by the defendant in its publication, was plainly made without regard to its truth and/or the consequences of publishing such untruths. It was incumbent upon the DW3 and within his powers to enquire and confirm the truth surrounding those issues before they were published. The inevitable conclusion to be drawn from was that there was a definite intent to injure the plaintiff in his reputation and to draw the plaintiff into a scandal, come what may.

(g) The final statement complained of by the plaintiff was para 28 in the

article which was to the effect that the plaintiff and DAP unabashedly ('tanpa segan silu') and without regard to the consequences have attacked Malay institutions and had acted to disparage the Malay community.

Once again apart from the fact that there was no 'attack' on the Malay community in the plaintiff's speech at the *konvensyen* to ground such a statement, there was also no evidence that the Malaya community had taken offence or had been stirred up to react, if at all that was the effect of the plaintiff's speech. I accept the plaintiff's counsel's submission that if that was the case as claimed by the defendant, then the very first group of persons to react or raise a ruckus would have been the participants at the *konvensyen*, of whom the majority were from the Malay community.

This statement at para 28 of the article in my view, betrayed the true motives of the writer of the article and the defendant, namely, to conduct a selective vendetta against the plaintiff and/or DAP. There was no legitimate cause or provocation to embark on such a tirade as was done here.

[49] Although 'justification' was not a defence pleaded in this case by the defendant, and it was not necessary for me to embark on an examination or determination of the veracity (truth or falsity) of the contents of each of complained statements, I found it necessary nevertheless to do so to some degree to highlight the conclusion that I had come to, namely that this 'rencana' was hatched in bad faith and its publication was motivated by malice to subject the plaintiff to contempt and scorn in the eyes of the public at large and to malign the plaintiff as Chief Minister of a state and as an elected representative of the rakyat.

The seven complained statements cannot be separated from the admitted context of this feature article by DW3, as was expressly acknowledged in para 1 of the article itself, namely the plaintiff's speech at the *konvensyen*, and more significantly the imputations intertwined in the said seven complained statements cannot be also be divorced or isolated from the tone of the baseless heading of the article itself — 'Kebiadaban Guan Eng'.

[50] Reverting then to the specific plea of 'malice' raised by the plaintiff, it must be noted that in para 11(a) of the statement of reply, the plaintiff averred that the defendant did not undertake any verification of the information or facts the writer (DW3) of the article relied on and included in the article. The obligation to verify the truth or the circumstances surrounding the contents of those statements before it was published was definitely on DW3 and by extention, vicariously on the defendant as the employer of DW3.

[51] Of particular note is the fact that in his testimony DW3 admitted that he did not verify the information or circumstances referred to and included in

A the article and neither did he make any attempt to do so. DW3 proffered an excuse that there was a boycott of *Utusan Malaysia* by the Penang State Government and that prevented his from doing so. To me, that excuse was a lame one and not acceptable. DW3 should have made an attempt in the least and if he had indeed been rebuffed by the plaintiff or relevant persons at the B State Government offices or agencies, then there might have been some cause to support the defendant's claim that the article was written 'bona fide'.

Facts or surrounding circumstances that might have developed or changed subsequent to earlier reports of events in *Utusan Malaysia* (which DW3 C claimed he used) should also have been verified and checked by DW3 even with Utusan Malaysia' bureau in Penang itself to which and personnel there, DW3 had always access to. This prudent step was not undertaken by DW3.

Disregard of this basic requirement to verify, which was an integral part of 'responsible journalism', tainted the conduct of DW3 and the defendant and D the publishing of the rencana as been done with malice against the plaintiff. There was no urgency to publish the feature article as such. It should have been done with care and circumspect after relevant research and verification of matters included in the *rencana* had been conducted by DW3 and/or the E relevant editors of the defendant.

[52] Lord Nichol's tests laid down in *Reynold*'s case discussed earlier in this judgment also alludes to an opportunity that should be given to a party about whom a 'publication' in to be made, to make comment or explain himself, F before the material is published and disseminated. This was also neglected here in this case.

The language used and reliance on half-truths (tantamount to willful misinformation, I should also add) all left me with one inevitable conclusion that the feature article written by DW3 and published in *Utusan Malaysia* of 20 G december 2010 was intentionally made to malign the plaintiff without any cause and most unfairly. To me, it was as if the defendant was waiting for an opportunity to pounce upon the plaintiff and the choice of the plaintiff's speech at the *konvensyen* to meet whatever that agenda was, turned out to be a H totally misplaced one, as has been established on the evidence before me.

[53] Order 78 r 3(3) only imposed an obligation on the plaintiff to raise in the statement of reply 'particulars of the facts and *matters from which the malice is to be inferred*'. (Emphasis added.) I hold that the plaintiff has duly proved I 'malice' in the terms of para 11 of the statement of reply and the particulars therein set out.

[54] In the result, the defendant's second defence of 'qualified privilege in common law' also failed, in any event, on account of actual 'malice' been

adequately established by the plaintiff.

CONCLUSION

[55] The seven complained paragraphs of the *rencana* published by the defendant in *Utusan Malaysia* of 20 December 2010 under the heading 'Kebiadaban Guan Eng' were indeed defamatory of the plaintiff. In the result the plaintiff is entitled to be awarded damages for libel which shall be paid by the defendant.

DAMAGES

[56] At para 10(g) of the statement of claim the plaintiff prays for one set of damages to include within it aggravated and exemplary damages as well; a rolled-in-one damages, as I read it.

[57] To award one global lump sum as damages in defamation proceedings, it is noted elsewhere, is the judicial trend these days (see *Chin Choon @ Chin Tee Fut v Chua Jui Meng* [2005] 3 MLJ 494; *WLP Industrial Solutions (M) Sdn Bhd v KL-Kepong Rubber Products Sdn Bhd* [2011] 6 MLJ 623). This was opted for, it is stated, to ensure that awards of monetary damages are not excessive and also to avoid any double counting in the amount awarded.

[58] Libel is actionable per se, that is to say, the plaintiff is not required to show any actual damage. Libel — that is published material — is dealt with greater severity (if contrasted with slander) because in libel, the consequences are of more durable and of a permanent character. In our case the defamatory words were published in a national newspaper commanding vide readership particular amongst members of the Malay population.

[59] Although *general damages* in libel are assessed and awarded on a compensatory basis for injury to feeling and distress caused to the plaintiff, it is more to vindicate the plaintiff's reputation in the eyes of the public in the community and to some extent arrange his or her hurt feelings. The amount to be awarded will turn on the circumstances of each case and will take into consideration various factors including the serious nature or gravity of the libel, the effect it would have to the standing of the plaintiff in society, the extent of publication, the defendant's indifference and disregard for the truth, and the absence of any retraction or apology, amongst others. It will therefore differ from one case to another and is often referred to as being 'at large'.

[60] For *aggravated damages*, to be made the court has to take into account the conduct of the defendant, the conduct itself of the case and the defendant's state of mind. The want of an apology at early stages of the proceedings would

not by itself entitle the plaintiff to an award of aggravated damages but once the weakness of the defendant's case becomes obvious, it would be natural to expect the defendant to place an apology on record. Aggravated damages is given or ordered to show the court's reluctance to approve of or condone willful, outrageous conduct of the defendant which should not have been vented on the plaintiff.

[61] *Exemplary damages*, per James Fong J (as His Lordship then was) in *Roshairee bin Abdul Wahab v Mejar Mustafa bin Omar & Ors* [1996] 3 MLJ 337; [1997] 1 CLJ Supp 39 'must be restricted to situations where there are oppressive arbitrary or unconstitutional action by servants of the government or where the defendant's conduct has been calculated by him to make profit for himself which may well exceeded the compensation payable to the plaintiff. In other words if it is shown that the defendant had wantonly made the defamatory statement and the defendant's objective was of deriving some 'financial gain' from the publication, then only would exemplary damages merit to be awarded.

[62] Apart from general damages, I am convinced that there are grounds to consider aggravated damages as well, in this case but not exemplary damages as there was no material before me to conclude that the defendant had made any 'financial' gain as a result of the publication of the article in question or that was the primary motive behind the publication of the 'rencana' by the defendant.

[63] In my view, additionally, in the particular context of this instant case where the defamatory material was published or carried in a widely circulated national newspaper, the quantum of damages to be ordered should also reflect the court's disdain for anything less than the highest standards of professionalism and 'responsible journalism' conforming to international norms, being exercised by the print or alternative media practitioners with regard to what they publish for public consumption.

As our nation moves towards becoming a more liberal democracy, the courts will face increased challenges as the final arbiter where the freedom of speech and expression guaranteed by the Constitution (art 10) has to be balanced against the equally important protection that have to be given to the rights and dignity of the citisenry overall. The need for best practices on the part of reporters, bloggers, journalists and others involved in the traditional or alternative media take on increased importance and the court's would have to respond appropriately when the required standards are violated or the right to publish freely are abused.

[64] After having given due regard to all matters and factors adumbrated above, I ordered the defendant to pay the plaintiff a single global amount as

general and aggravated damages in the sum of RM200,000. The defendant was also to pay the plaintiff costs of this proceedings fixed at RM25,000.

The defendant was also to pay interest on the said RM200,000 at 4%pa from date of this order until date of full settlement.

Plaintiff awarded damages in sum of RM200,000 with interest and costs fixed at RM25,000.

Reported by Kohila Nesan